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PROPERTY RIGHTS AND THE CONSTITUTION

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INTRODUCTION

As part of its constitutional package announced in September 1991, the federal government proposed that the *Canadian Charter of Rights and Freedoms* be amended to guarantee property rights. This paper provides background information on the issue of the entrenchment of property rights, including information as to why these rights were not earlier included in the Charter. The paper also addresses what is meant by the term "property rights" and the question of how the courts might interpret the term "property" for purposes of the relevant provision if it were included in the Charter. Finally, the paper canvasses possible arguments for and against the proposed entrenchment.

FORMER PROPOSALS TO ENTRENCH PROPERTY RIGHTS IN THE CONSTITUTION (1968-1983)

The entrenchment of property rights in the Constitution appears to have been the policy of the former Liberal government since 1968. In that year, as Minister of Justice, Pierre Trudeau proposed the passage of a charter which would give constitutional protection to certain rights, including the "enjoyment of property." In 1969, as Prime Minister, Mr. Trudeau again proposed entrenchment of a charter of rights which would have guaranteed the right of an individual to use and enjoy property, with the assurance that there would be no deprivation of property except in accordance with proper legal procedures.

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After the failure of the Victoria Conference in 1971, constitutional reform was not a major issue again until the late 1970s. In 1978, Bill C-60, the Constitutional Amendment Bill, contained a guarantee of:

> the right of the individual to the use and enjoyment of property, and the right not to be deprived thereof except in accordance with law.

The bill was intended to be a stimulus to constitutional debate and negotiation, and it was hoped that a charter containing the foregoing guarantee of property rights would eventually be ratified by the provinces and included in the Constitution. Some provinces, in particular Manitoba and Prince Edward Island, were quite opposed to such a proposal. They feared that provincial legislation regulating land ownership and use could be nullified by such a constitutional guarantee. The federal government took the position that this guarantee was considerably weaker than other proposals since it only required that a deprivation be "in accordance with law," a formulation which respected provincial jurisdiction over "property and civil rights."

The federal government re-drafted the property rights guarantee for the 1980 First Ministers' Conference. In order to allay provincial fears, the proposed Charter of Rights contained the following section:

> 9.(1) Everyone has the right to the use and enjoyment of property, individually or in association with others, and the right not to be deprived thereof except in accordance with law and for reasonable compensation.
>
> (2) Nothing in this section precludes the enactment of or renders invalid laws controlling or restricting the use of property in the public interest or securing against property the payment of taxes or duties or other levies or penalties.

A number of provinces still strenuously opposed this guarantee. While there was opposition to the whole concept of a Charter of Rights among the provinces, the actual content of the proposed Charter was of less concern, with the exception of the property rights guarantee. Accordingly, this guarantee was omitted from the Charter contained in the proposed resolution

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of October 1980. In the absence of a consensus on this issue, the government was prepared to defer it to the "second round" of constitutional reform, when it could be incorporated pursuant to the amending formula in the new Constitution.

During the proceedings of the Special Joint Committee on the Constitution of Canada in 1981, the Progressive Conservative Party proposed an amendment to s. 7 of the Charter, the guarantee of basic legal rights, which would have added the underlined words:

> Everyone has the right to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Through acting Minister of Justice Robert Kaplan, the government first indicated a willingness to agree to this amendment. Further representations from some provinces, however, particularly Prince Edward Island, and the New Democratic Party's refusal to agree to a guarantee of property rights unless consideration was given to incorporation of a number of other economic and social rights, appear to have convinced Justice Minister Chrétien to adhere to the original plan, and the Conservative amendment was defeated.

After the proclamation of the *Charter of Rights and Freedoms* in April 1982, the issue lay dormant for a year, at least at the federal level. In September 1982, the British Columbia Legislature had unanimously passed a resolution seeking an amendment of s. 7 of the Charter similar to that proposed by the federal Conservative Party. Further, at a First Ministers' Conference called in March 1983 to deal with aboriginal rights, some premiers indicated a willingness to support a property rights amendment. Accordingly, on 21 April 1983, Prime Minister Trudeau stated in the House of Commons that if the opposition parties agreed to limit debate to one day, the government would introduce a resolution entrenching in s. 7 the right to enjoy property. This resolution, with the required support of seven provinces having at least 50% of Canada's population, could have amended the Charter.

The Conservative Party agreed with this proposal. The New Democratic Party, however, wanted more detailed consideration of the

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matter. It did not oppose a property rights guarantee *per se*, but wanted the matter referred to a parliamentary committee which could report after hearing concerned members of the public and representatives of the provinces. Representatives of the NDP were concerned about such matters as: the effect of a guarantee on provincial legislation regulating non-resident ownership of land; the ability of governments to legislate on and control unique types of "property," such as data bank information; legislation providing mortgage relief; legislation preserving farmland and recreational land; legislation regulating businesses, such as legislation setting a minimum wage; and legislation dealing with the division of matrimonial property.

While negotiations were proceeding to try to accommodate the concerns of the NDP, the Conservative Party introduced, in the form of a non-confidence motion, a resolution containing a proposed amendment to s. 7 of the Charter. This move brought the process to a halt. The government, not surprisingly, would not vote in favour of a non-confidence motion. (In any event, even if it had done so, the motion's success would have dissolved Parliament, precluding passage of the resolution in the Senate.) This ensured defeat of the proposed amendment. Further, since the rules of the House forbade the reconsideration in the same session of a question that had been negatived, such an amendment could not be considered again until the next session of Parliament. Effectively, the Conservative motion prevented further consideration of a property rights amendment in the 1st session of the 32nd Parliament. The Conservative motion could have been withdrawn with the unanimous consent of the House, but the NDP refused to agree. On 2 May 1983, the motion was defeated. In the 2nd session of the 32nd Parliament, which began in December 1983 and concluded in June 1984, the issue of a property rights amendment did not arise.

In one significant development after 1983, on 15 October 1987, Mr. John Reimer, M.P., introduced a motion in the House of Commons to amend the *Constitution Act, 1982* so as to include property rights within the *Canadian Charter of Rights and Freedoms*. Mr. Reimer's motion was amended so that it expressed support in principle for a property rights amendment, rather than proposing such a specific amendment itself. The

motion, as amended, was adopted by a 108 to 16 vote, and thus became a resolution of the House, as follows:

> That in the opinion of this House, the *Constitution Act, 1982* should be amended in order to recognize the right to enjoyment of property, and the right not to be deprived thereof, except in accordance with the principles of fundamental justice, and in keeping with the tradition of the usual federal-provincial consultative process.(1)

PROCEDURE FOR ENTRENCHMENT OF PROPERTY RIGHTS

Since the Charter is part of the Constitution, it can be repealed or amended only by the process of constitutional amendment. This is explicit in s. 52(3) of the *Constitution Act, 1982,* which provides that "Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada." The Constitution of Canada is defined in s. 52(2) as including "this Act," and Part I of "this Act" is the Charter. Amending the Charter to include a reference to property rights in s. 7 would have to be authorized in accordance with the general amending procedure established by s. 38(1) of the *Constitution Act, 1982.* This requires authorization by (a) resolutions of the Senate and the House of Commons, and (b) resolutions of the legislative assemblies of at least two-thirds of the provinces, having in aggregate at least 50% of the population of all the provinces. The 50% population requirement means that the agreeing provinces must include Ontario or Quebec, since the combined population of those two provinces is more than 50% of the population of Canada. Section 38(2) requires a resolution supported by a majority of the members of the legislature, rather than a majority of those present and voting, if the proposed amendment "derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province." A property rights amendment to the Charter would be such an amendment. Section 38(3) permits the legislative assembly of a province to "opt out" by passing a

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(1) Canada, House of Commons, *Debates,* 2 May 1988, p. 15044.

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resolution of dissent to an amendment of the kind described as s. 38(2) "prior to the issue of the proclamation to which the amendment relates." A maximum of three provinces could opt out of such an amendment by passing resolutions of dissent. If there were more than three dissenting provinces, the amendment would not have the required support of two-thirds of the provinces and would therefore be defeated.

The procedures for amendment "may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province" (s. 46(1)). Once the authority for an amendment has been provided by the requisite number of resolutions of assent, s. 38(1) provides that the formal act of amendment is accomplished by a "proclamation issued by the Governor General under the Great Seal of Canada." Section 39 imposes time limits on the issue of this proclamation. Under s. 39(1), the proclamation is not to be issued until a full year has elapsed from the adoption of "the resolution initiating the amendment procedure," unless before that time all provinces have adopted resolutions of assent or dissent. The intent here is to allow each legislative assembly sufficient time to consider the proposal. Under s. 39(2), the proclamation is not to be issued after three years have elapsed from the adoption of the resolution initiating the amendment procedure.

DEFINITION OF "PROPERTY"

In its constitutional package announced in September 1991, the federal government simply proposed that the *Canadian Charter of Rights and Freedoms* be amended to guarantee property rights. This was the only reference made to property rights. No indication was given as to how "property" would be defined if such rights were entrenched in the Charter. Similarly, no definition of "property" had been included in earlier proposals to entrench property rights in the Charter, neither at the time of the committee hearings on the Constitution in 1981 nor later in the House of Commons.

If property rights were entrenched in the Charter but the term "property" were left undefined, Canadian courts would be given wide

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latitude to define the term for purposes of the provision. For example, they might define "property" to include only traditional types of property, such as tangible assets like real property, chattels, and traditionally recognized property such as stocks and debentures. Alternatively, the courts might choose a less traditional interpretation, so as to include the so-called "new property" -- i.e., various forms of government benefits, such as welfare payments, old age benefits, unemployment compensation, etc. This is the way the term has been interpreted in the United States.

The Fifth Amendment to the U.S. Constitution, passed in 1791, provides that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation. The courts in the United States have interpreted "property" within the meaning of this constitutional provision to include the traditional types of property, such as tangible assets like real property and chattels, and also intangible assets, such as patents and copyright. The courts have gone even further to include the so-called "new property," comprising various forms of government benefits.

The American judicial position with respect to "new property" has been summarized as follows:

> While the government is not required to give a benefit such as welfare or public housing, if it does distribute these benefits, it must do so in accordance with constitutional principles, which require procedural fairness principles to be followed. Thus, once a system has been established which creates a claim for entitlement for an individual, then the due process clause will apply. A claim for entitlement arises if the law establishes the criteria for continued receipt of benefits, and the individual appears to meet the criteria. If in fact the law creates no claim to future payments, then an individual has no claim. There is no distinction between privileges and rights.(2)

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(2) Jean McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights," *Alberta Law Review*, 1988, Vol. 26, p. 548-583, at p. 581.

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In short, in the United States, where a right to property is entrenched in the Constitution, the meaning of "property" has evolved through judicial interpretation. When property rights are now referred to in the context of the U.S. Constitution, it is no longer sufficient to focus simply on the right to own or occupy land, or to possess or use chattels. One must take into consideration such matters as the social security system established by government, and intangibles such as copyrights, patents and trademarks. Also, once the government has established a system that creates a claim of entitlement for an individual, the due process clause will apply should the government decide to discontinue the entitlement.

One can only speculate on how Canadian courts would define "property" if this were left undefined. If it were interpreted both in the traditional sense and also to include certain government benefits, as is done in the United States, the entrenched property rights would have the potential to benefit those who do not own real property. Courts might be involved in determining whether government benefits were essential to the security of the person and whether appropriate procedural safeguards had been observed in the course of denying or depriving an individual of entitlements.

ARGUMENTS FOR ENTRENCHMENT

A number of arguments have been put forward in favour of the constitutional protection of property rights.

First of all, there is the historical precedent. Property rights have played a central role in the evolution of Canadian society and indeed are an essential part of British parliamentary democracy. These rights can be traced back to the year 1215, when the *Magna Carta* was signed. The right to own property was also included in the English *Bill of Rights* in 1689. In 1948, Canada signed the *United Nations Universal Declaration of Human Rights,* Article 17 of which reads:

1) Everyone has the right to own property alone as well as in association with others.

2) No one shall be arbitrarily deprived of his property.

Property rights are also recognized in the 1960 *Canadian Bill of Rights*, which affirms the right of the individual to the enjoyment of property and the right not to be deprived thereof except by due process of law. Clearly then, it is arguable that our Constitution should be brought into line with these historical documents.

The Supreme Court of Canada, in the case of *Harrison* v. *Carswell*, (3) commented upon property rights in Canadian law as follows:

> Ango-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, of any interest therein, save by due process of law.(4)

Section 26 of the Charter stipulates that:

> The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights and freedoms that exist in Canada.

Case law has construed this section to mean that the common law protection of property rights is at least not threatened by the Charter.(5) Only the inclusion of property in the Charter, however, would enable an individual whose property rights had been infringed to have recourse to the enforcement section of the Charter. Subsection 24(1) states in part that "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court ... to obtain such remedy as the court considers appropriate and just in the circumstances."

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(3) (1975), 62 D.L.R. (3d) 68.

(4) *Ibid.*, p. 83.

(5) *The Queen in Right of New Brunswick* v. *Fisherman's Wharf Ltd.*, (1982), 135 D.L.R. (3d) 307, aff'd. on other grounds, (1983), 144 D.L.R. (3d) 21.

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It should be noted as well that the notion of property rights appears to enjoy public support. A poll commissioned by the Canadian Real Estate Board in 1987 found that 81% of Canadians considered it either "very" or "fairly" important that the Constitution be amended so as to include property rights. Various national organizations, such as the Canadian Bar Association, the Canadian Chamber of Commerce, and the Canadian Real Estate Association, have also stressed the need to include property rights in our Constitution.

In entrenching property rights, Canada would be following the lead of a number of other democratic countries, including the United States, West Germany, Italy and Finland. In the United States, as noted above, the Fifth Amendment to the U.S. Constitution provides that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation. In 1868, the Fourteenth Amendment to the U.S. Constitution was passed, stipulating that no state shall deprive any person of life, liberty or property, without due process of law. Thus, in the United States and in a number of other countries where property rights have received constitutional protection, their fundamental importance to the preservation of democracy is recognized.

It has been argued that consistency demands that those fundamental rights now guaranteed by our Constitution -- life, liberty and security of the person -- be given their natural and essential correlate, the enjoyment of property. Some argue that to omit and deny the right to property is to diminish and indeed render meaningless the right to life, liberty and security of the person at present guaranteed by the Charter. Property and the right to enjoy it are essential features of a democratic society. The right to own and enjoy property of all types allows Canadians, whether self-employed or wage-earners, to enjoy the fruits of their endeavours.

One of the concerns voiced about the inclusion of property rights in the Charter relates to the complicated matter of the definition of the term "property." Through time, the term has evolved to mean much more than real property. The fact that the term will have to be

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interpreted by the courts, which may interpret it very broadly, is, however, not a good reason for excluding property rights from the Charter.

Finally, the inclusion of property rights protection in the Charter would mean that the government could not disregard these rights unless it could justify its actions and satisfy the onus set forth in s. 1 of the Charter, which stipulates that:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

By virtue of this section, a person who felt that his or her property rights had been infringed by legislation would have to establish a *prima facie* case; once this had been established, the onus would shift to the enacting body to demonstrate that the legislation was a reasonable limit upon rights and freedoms, and was justified in a free and democratic society.

ARGUMENTS AGAINST ENTRENCHMENT

The above discussion reflects the arguments in favour of entrenching property rights in our Constitution. There are, however, serious concerns about the possible adverse consequences of such entrenchment.

Critics warn that entrenchment may have unintended consequences, affecting such things as municipal zoning rules, native land claims, pollution regulations and a spouse's right to property on the dissolution of a marriage. Others are concerned about how property rights might be interpreted by the courts, if no definition of "property" were included in the Charter.

For instance, the Canadian Advisory Council on the Status of Women dealt with the matter of the entrenchment of property rights in a resolution dated 27 September 1983. The resolution read in part as follows:

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> Whereas on March 29, 1983, an amendment to Article 7 of the *Canadian Charter of Rights and Freedoms,* concerning property rights, was introduced in the House of Commons and was defeated;...
>
> Whereas the aim of the amendment of March 29, 1983 was to protect property rights in the traditional sense of the word, meaning primarily real property;
>
> Whereas Canadian women in general, are not owners of real property and, furthermore, own relatively little property of any kind;
>
> Whereas the probable consequences of such an amendment have not been sufficiently studied and discussed;
>
> Whereas such an amendment could have grave consequences on the rights which women have already obtained, such as the right to division of the matrimonial home;
>
> Whereas any increased protection of property in the Canadian Constitution must also protect new types of property, which are often social rights and benefits such as rent control, pensions and labour standards;
>
> The CACSW recommends to the federal government that no new amendment be introduced in the House of Commons before an in-depth study can be made to establish the consequences of such a measure on the lives of Canadian women. We also ask that any such measure be submitted to the general public so that Canadian women be given the chance to voice their opinion on the matter.(6)

A number of other groups have also indicated their concerns about the possible inclusion of property rights in the Constitution. For example, Native groups are worried about how their land claims and land entitlement would be affected. Labour groups have expressed concerns about how the rights of workers might conflict with the rights of those who own property. Environmental groups have concerns about the kinds of laws that could be passed if property rights were entrenched.

In addition, a number of provinces are concerned that the constitutional entrenchment of property rights would enable the courts to

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(6) As cited in Canada, House of Commons, *Debates,* 1 February 1985, p. 1935.

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interfere with laws that protect important societal interests. They cite, for example, land use planning and municipal laws, real and personal property laws, environmental laws, and health and safety laws. They ask whether an entrenched right to property might affect the ability of the provinces to control the use of privately-owned lands, to protect the environment, or to protect communities.

In September 1991, a Report on the Constitution by the Special Committee of the Legislative Assembly of Prince Edward Island specifically recommended that property rights not be included under the Charter because of that province's need to protect and preserve its shoreline and its agricultural land.

Insofar as the provinces are concerned, it should be borne in mind that a province that feared its legislation might infringe upon a property rights guarantee (or whose legislation was found to do so) could always invoke s. 33 of the Charter and declare that its legislation would operate notwithstanding a Charter guarantee of property rights.

CONCLUSION

This paper has presented a number of possible arguments for and against the inclusion of property rights in the *Canadian Charter of Rights and Freedoms*. As noted in the paper, it is unknown how Canadian courts would define "property" for this purpose. It is clear, however, that the entrenchment of property rights in the Charter would do more than simply protect those who own real property from expropriation without compensation. If "property" were interpreted by the courts more broadly than in the traditional sense, the entrenchment of property rights could also have positive effects for those persons who do not own real property. If the interpretation of the term "property" were to include what is known as the so-called "new property" of government benefits, as does the interpretation of the term in the United States, presumably recipients of such government benefits could not be deprived of them without a fair hearing.

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The entrenchment of property rights in the Charter would also entitle those whose property rights were infringed to use the remedy section of the Charter (s. 24(1)). This provision, combined with the safeguards provided by s. 1 of the Charter, would protect property rights from arbitrary interference.